# Meeting Safely, Legally

By Beth Braverman

With schools, sporting events, and many businesses shut down in an attempt to slow the spread of coronavirus with "social distancing," many companies are scaling back or entirely eliminating in-person shareholder events and transitioning to virtual meetings instead.

Most public companies have historically held in-person meetings, providing an opportunity for shareholders to make sure management can hear their concerns. But this year, several high-profile companies have already announced entirely virtual meetings, and many others have said they're considering doing the same. As of publication, meeting announcements from corporations and proxy advisers — in addition to government orders of interaction to stem the spread of the virus — were changing by the hour.

Starbucks, which typically draws thousands to its annual meeting in Seattle, one of the first U.S. cities hard hit by COVID-19, moved its March 18 meeting online. Amazon announced it will conduct its May meeting the same way, and even Berkshire Hathaway's annual meeting in Omaha — known by fans as "Woodstock for Capitalists"— will be a virtual gathering this year on May 2.

In a letter to shareholders, CEO Warren Buffett wrote that he regretted the move, because he considered the meeting a high point of the year.

"It is now clear, however, that large gatherings can pose a health threat to the participants and the greater community," Buffett wrote. "We won't ask this of our employees, and we won't expose Omaha to the possibility of becoming a 'hot spot' in the current pandemic."

Considering many factors

Moving meetings online seems like the obvious choice given today's available technology and the current restrictions on travel and large gatherings, but there are still many factors that boards must consider, and they need to consider them right away. Annual meeting season starts to really pick up around late April and May.

Louis Lehot, a Silicon Valley-based lawyer who works with both public and private directors, says many of his clients are drafting press releases and filings around a potential shift to virtual meetings, but they're taking a wait-and-see approach, given the quickly changing nature of COVID-19 societal restrictions.

"We don't really know where they're going to be in late April," he says. "Will we still have shelter-in-place? What will be the experience for the companies that do virtual meetings?"

Of course, changing plans for an annual meeting is just one part of a broader focus among boards right now to help guide their companies through the uncharted waters of a global pandemic and a potential recession.

Companies are shifting into crisis-management mode, and that changes the role of boards, says Shannon Gordon, CEO of The Boardlist.

"Executive teams are putting together plans to take care of the business, the employees and their customers, but boards have an important role to play in terms of oversight and risk planning," she says. "That's where they're putting in a lot of energy."

**Compliance concerns**

When it comes to changing their plans for an annual meeting, one of the first things for companies to consider is whether they're allowed to hold a meeting that's completely virtual. That means looking at their organizational documents to make sure that there are no restrictions and double-checking any relevant state regulations.

Currently, 30 states, including Delaware, where two-thirds of Fortune 500 companies are incorporated, permit companies to hold virtual-only shareholder meetings. Twelve states allow for hybrid meetings that are virtual with an in-person component. According to Broadridge Financial Solutions, the following states do not, in current laws, allow virtual meetings: Alabama, Alaska, Arkansas, Georgia, Idaho, New Mexico, New York, South Carolina, and South Dakota.

However, that is changing, at least for this year. New York, for example, requires an in-person component to annual shareholders' meetings but it currently has the highest number of confirmed COVID-19 cases in the country. New York Gov. Andrew Cuomo suspended the in-person requirement through an executive order March 20 that also required all "non-essential" businesses to implement work-from-home policies.

Alaska passed a similar executive order allowing virtual meetings March 19, and Georgia’s governor is allowing remote meetings if shareholders are able to participate and vote.

Publix, a chain of grocery stores, will have an abbreviated shareholder meeting at its corporate offices in Florida. The company put out a notice to stockholders discouraging their attendance. The condensed meeting is expected to run about 10 minutes with no speeches.

“I don’t think that any state is going to force a company to do a public meeting in a fashion that endangers public health,” Lehot says. “They’re going to have to amend or waive or give guidance around those policies this year.”

In states that require an in-person meeting along with the virtual one, a few directors meeting in person while hosting a larger meeting online may satisfy the law’s requirements. Investor relations consultant Carl Hagberg suggests having just the board chair, the corporate secretary and a videographer at the in-person meeting.

In the case of Berkshire Hathaway, Buffett plans to attend the meeting in person, along with a handful of employees and possibly a journalist, according to Buffett’s letter. Yahoo would livestream the meeting.

Once a company decides to go with a virtual format, it’s important to share the information with shareholders as quickly as possible.

The Securities & Exchange Commission (SEC) issued guidance in March aimed at helping companies that need to change their annual meeting plans after they’d already sent proxy materials. The agency said that in such cases, companies would need to issue a press release announcing the change, file the announcement on EDGAR (Electronic Data Gathering, Analysis, and Retrieval), an online public database from the SEC, and take all other “reasonable steps necessary to inform other intermediaries in the proxy process.”

Again, state laws may vary, so companies need to make sure they’re in compliance with those as well. Some states may require that companies notify shareholders by mail if they plan to make changes to the announced meeting location.

Hagberg says the communication should not only let shareholders know there is a virtual meeting option, but also encourage them not to attend the in-person meeting, if there is one.

“The objective needs to be explaining to people why they’d be ill-advised to show up for your annual meeting, and how they can participate without coming in person,” he says.

Companies should also put physical notices at the points of entry for the physical meeting, just in case there are shareholders who missed the memo that it would be moved online.

**Selecting a vendor**

There are other considerations, as well, when it comes to quickly moving a meeting from in-person to virtual. Among them: choosing a vendor to facilitate the meeting and making necessary changes to the agenda and format in light of the switch.

Hagberg recommends that companies consider having both audio and video in their virtual meetings to increase engagement among those tuning in.

“Audio alone doesn’t hold people,” he says. “Even if you’re not videoing the entire proceeding, have some photos, some charts, some bullet points you can put up. You want to avoid shareholders thinking that this is an excuse to get rid of them or to dumb down the meeting. That would not a be smart thing to convey.”

Still, there’s no requirement to include a video component. Of the 326 companies that used the vendor Broadridge to host virtual annual meetings, fewer than 40 used video.

The virtual meeting should allow for shareholder participation and voting and enable company officials to see how many shareholders have joined. The vendor should also have a method for vetting participants to confirm that they’re shareholders prior to joining the call.

The SEC guidance recommends that companies moving to virtual meetings include a way for shareholders and their representatives to present their proposals. Attendance at the meetings may actually go up, given that there’s no travel required to attend, and many people’s schedules have opened up in recent weeks as work they work from home and practice social distancing.

“One of the things companies need to think about is that when you hold the meeting virtually, you can have many more shareholders participate,” says Pam Marcogliese, a partner with law firm Freshfields Bruchaus Deringer. “They need to be prepared to handle an increased volume of participants, which may or may not translate into an increased number of questions.”

## Adjusting meeting rules

That may require creating and sharing rules upfront about how much time each person gets to ask a question, and how those questions will get shared with all attendees. Options include collecting questions ahead of time, allowing virtual submissions during the meeting, and letting people call with live questions.

Some shareholder activists in the past have opposed virtual-only meetings, arguing that they reduce the visibility of shareholder proposals and make it harder for them to make their case directly to management. This year, however, many recognize the extenuating circumstances.

Still, shareholder activist James McRitchie says he hopes companies would try to simulate in-person meetings by allowing everyone in attendance to see all questions as they are entered and the identity of the person submitting the question.

“I’ve never seen even that basic step taken at a virtual meeting,” he says. “Instead, questions are routinely screened to avoid touchy subjects.”

Beyond large shareholder meetings, companies might also consider making even smaller board meetings online — only for the near future, Hagberg says. The latest federal social distancing guidelines ban meetings of 10 or more people and discourage unnecessary travel.

That’s particularly important guidance for many board members, given that many directors are over age 60, which puts them at higher risk for COVID-19.

“Directors shouldn’t be getting on planes to go to meetings this season,” Hagberg says. “Most of them are in good physical and mental health, but they’re within the guidelines of people who should stay home unless it’s absolutely necessary to travel, and it’s not absolutely necessary.”

## Looking ahead

Like everything else, the way that companies conduct board and shareholder meetings will likely permanently change post-coronavirus. A growing minority of companies have already made the shift to virtual meetings, and this year will likely only hasten the trend.

In 2019, 7.7% of companies had virtual-only meetings, more than three times the share that had virtual meetings in 2014, according to ISS analytics. That share will likely skyrocket in 2020. Macrogliese says that's going to make this year very instructive for companies going forward.

"It's going to be a balancing between how much more effective it is and how much more disruptive it is," she says.

McRitchie says he hopes that companies move back to in-person or hybrid meetings when the threat of COVID-19 has passed.

"Virtual-only meetings essentially lock out the casual interactions between shareholders, staff, management, board and other shareholders that can be very informative and that provide avenues for sharing ideas," he says. "These meetings are acceptable only in the unusual circumstances of COVID-19."

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